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No. 82-121

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOHN CLAYBURN HAWKINS, JR., a/k/a "J.C." AND RECEA HOWELL HAWKINS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a defendant convicted of conspiracy to violate the Racketeer Influenced and Corrupt Organization (RICO) Act and an underlying substantive RICO offense may be sentenced consecutively for those offenses.

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a) is unreported. The opinion of the district court (Pet. App. 1c-10c) is reported at 516 F. Supp. 1204.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 1982. A petition for rehearing was denied on May 24, 1982 (Pet. App. 1b-2b). The petition for a writ of certiorari was filed on July 21, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Georgia, petitioners were convicted of participating in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C.

1962(c), conspiracy to commit that offense, in violation of 18 U.S.C. 1962(d), and possession of a shipment of shirts stolen in interstate commerce, in violation of 18 U.S.C. 659 and 2. In addition, petitioner J.C. Hawkins was convicted on two counts of possession of a stolen interstate shipment of meat and dairy products, in violation of 18 U.S.C. 659 and 2, and of receiving and disposing of a counterfeit security moving in interstate commerce, in violation of 18 U.S.C. 2315. Petitioner J.C. Hawkins was sentenced to consecutive terms of 20 years' imprisonment on the RICO conspiracy and substantive counts and 10 years' imprisonment on each of the remaining counts, with the proviso that he would not have to serve more than a total of 40 years' imprisonment. Recea Hawkins was sentenced to consecutive terms of 20 years' imprisonment on each of the RICO counts and 10 years' imprisonment on the one remaining count, with the similar proviso that he would not have to serve more than a total of 25 years' imprisonment.[1] The court of appeals affirmed petitioners' convictions. *United States* v. *Elliott*, 571 F. 2d 880 (5th Cir.), cert. denied, 439 U.S. 953 (1978).

Petitioners then moved the district court, pursuant to Fed. R. Crim. P. 35(a), for correction of their sentences on the RICO counts, claiming that their convictions on these two counts merged for purposes of sentencing. The district court denied their motion (Pet. App. 1c-10c), and the court of appeals affirmed (Pet. App. 1a).

The evidence adduced at trial is set out in detail in the opinion of the court of appeals affirming petitioners' convictions (571 F. 2d at 884-895). Briefly, it showed that petitioner J.C. Hawkins headed an extensive criminal

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[1] In sentencing petitioners, the trial judge stated that it was his intention that their sentences would be fixed at terms of 40 and 25 years respectively if their convictions on counts carrying sentences in excess of that term were affirmed on appeal (Tr. 2776).

enterprise that was involved in receiving and selling stolen goods, importing and distributing narcotics, committing arson and murder, and obstructing justice in prosecutions brought against participants of the organization. J.C. Hawkins was personally involved in each of the criminal activities charged as predicate acts of racketeering. His brother, petitioner Recea Hawkins, also participated in the affairs of the enterprise through a pattern of racketeering activity. Among the specific acts proven at trial, the government established that petitioners together were instrumental in burning down a nursing home in Sparta, Georgia, at the behest of a co-conspirator (571 F. 2d at 884-885); that J.C. Hawkins, assisted by Recea Hawkins, concealed and sold part of a stolen 33,000 pound shipment of Hormel meat (*id.* at 886-887); that Recea Hawkins, at J.C. Hawkins' request, murdered an individual who was a potential witness against J.C. Hawkins in a state criminal trial (*id.* at 888-889); that petitioners concealed and sold a truckload of stolen shirts (*id.* at 891-892); that petitioners purchased several stolen automobiles from a co-conspirator (*id.* at 886); and that J.C. Hawkins purchased and concealed a truckload of stolen Swift meat and dairy products (*id.* at 889-890), was involved in selling counterfeit automobile titles (*id.* at 885-886), and also took part in several narcotics transactions involving methamphetamine, cocaine, heroin, marijuana and MDA (*id.* at 892-894).

ARGUMENT

Petitioners' sole contention is that the district court unlawfully sentenced them consecutively for the RICO conspiracy and RICO substantive offenses. They argue that the decision below, which accords with the Ninth Circuit's decision in *United States* v. *Rone*, 598 F. 2d 564, 569-571 (1979), cert. denied, 445 U.S. 946 (1980), conflicts with the en banc decision of the Sixth Circuit in *United States* v. *Sutton*, 642 F. 2d 1001, 1040 (1980), cert. denied, 453 U.S. 912 (1981).

While, as we show below, petitioners' claim that they were unlawfully sentenced is clearly without merit, it is not necessary for the Court even to reach that claim because petitioners' sentences would not be affected even if they were to prevail. It is true that the district court imposed consecutive sentences of 20 years on each RICO count. However, the court limited the total terms of imprisonment for petitioners Recea Hawkins and J.C. Hawkins to 25 and 40 years, respectively. Merger of the 20 year sentences on the two RICO counts would mean only that J.C. Hawkins' total sentence would be 60 years' imprisonment instead of 80 years. Sixty years is still far in excess of the 40-year maximum the district court provided. Recea Hawkins' total sentence in the event of such a merger would be reduced from 50 years to 30 years, which is also greater than the 25-year maximum that the court provided. Thus, even if, as petitioners claim, their RICO convictions merged for the purpose of sentencing into a single 20 year term, that would not diminish the actual period of their incarceration. Accordingly, review of petitioners' claim is unwarranted.

In any event, there is no merit to this claim. Petitioners' argument appears to rest on Wharton's Rule, which "states that an agreement between two people to a particular crime cannot be prosecuted as a conspiracy if the crime is of the type that necessarily requires the participation of two persons for its commission" (Pet. App. 3c). However, as the district court correctly ruled below (*id.* at 3c-4c), the RICO statute is not amenable to application of Wharton's Rule. See *United States* v. *Rone, supra*, 598 F. 2d at 569-571; *United States* v. *Ohlson*, 552 F. 2d 1347, 1348-1349 (9th Cir. 1977); *United States* v. *Boffa*, 513 F. Supp. 444, 478 (D. Del. 1980).

First, the plain language of 18 U.S.C. 1962(c), the substantive RICO provision, clearly indicates that a violation may be committed by an individual acting alone. The statute makes it unlawful for "any person" to conduct an enterprise affecting interstate commerce through a "pattern of racketeering activity." The definitions of "pattern of racketeering activity" (18 U.S.C. 1961(5)) and "racketeering activity" (18 U.S.C. 1961(1)) do not incorporate any element of agreement or concerted activity. See *United States* v. *Ohlson, supra*, 552 F. 2d at 1349. Even if two or more persons together constitute an associational enterprise, the proscribed activity is not the enterprise but the pattern of racketeering activity in its furtherance. Such criminal conduct can be the act of a single person. As the Ninth Circuit has observed, "[t]he enterprise is simply one of the jurisdictional elements of the statute." *United States* v. *Rone, supra*, 598 F. 2d at 570. See also *Iannelli* v. *United States*, 420 U.S. 770, 789 (1975) (the requirement of participation of "five or more persons" as an element of the substantive offense under 18 U.S.C. 1955 is jurisdictional and does not "represent[] a legislative attempt to merge the conspiracy and the substantive offense into a single crime").

Moreover, the proscribed offenses are significantly different from those, such as adultery, incest, bigamy, and dueling, to which Wharton's Rule traditionally has been applied. See *Iannelli* v. *United States, supra*, 420 U.S. at 784. In contrast to those offenses, the harm attendant upon the commission of the substantive RICO offense is not restricted to the offender; the parties prosecuted for the conspiracy need not be the same persons who are prosecuted for commission of the substantive offense; and agreements to enter into large-scale racketeering activities are likely to generate additional agreements to engage in other criminal endeavors. These significant differences

between the kind of offenses that gave rise to Wharton's Rule and the activities proscribed by RICO "counsel against attributing significant weight to the presumption the Rule erects." *Id.* at 786.

Finally, even if Wharton's Rule were otherwise applicable, it would be necessary to determine whether Congress intended to create an offense of racketeering separate and apart from conspiracy. The very inclusion in the RICO statute of a separate conspiracy provision is persuasive evidence that Congress so intended. Moreover, in its Findings and Purposes prefatory to the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 923, Congress stated its goal of "establishing new penal prohibitions, and * * * providing enhanced sanctions * * * to deal with the unlawful activities of those engaged in organized crime." See also *United States* v. *Martino*, 681 F. 2d 952, 956-957 (5th Cir. 1982) (en banc), petition for cert. pending, No. 82-472.

The Sixth Circuit's offhand statement in *Sutton* that "the proofs in this record showing these defendants violated § 1962(c) and § 1962(d) were identical," and its remand for resentencing where the sentences originally imposed were consecutive (642 F. 2d at 1040), does not create a conflict warranting this Court's review. The propriety of the consecutive sentences in *Sutton* was not even addressed in the briefs before the panel or the en banc court, and the disposition appears to have been strictly limited to that case. Moreover, apart from the paragraph in *Sutton* on which petitioners rely, the Sixth Circuit has provided no further indication that it has abandoned the well settled principle that a conspiracy and its underlying substantive offense are separate crimes properly subject to consecutive punishments. See, *e.g.*, *United States* v. *Nickerson*, 606 F. 2d 156, 159 (6th Cir.), cert. denied, 444 U.S. 994 (1979). Thus, in

the future, following full briefing on the issue, the Sixth Circuit may well affirm consecutive sentences imposed for a RICO conspiracy and a substantive RICO violation. Until that circuit clearly demonstrates that it regards such consecutive sentences for RICO violations to be per se improper, any alleged conflict between *Sutton* and the decisions of the other courts that uniformly have rejected the *Sutton* approach does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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